IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3746 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KALAVATIBEN ISHVARBHAI DESAI

Versus

JALDARSHAN CO-OPERATIVE HOUSING SOCIETY LTD.

Appearance:

1. Special Civil Application No. 3746 of 2002

MR RAVINDRA SHAH for Petitioner No. 1

MR SHIRISH JOSHI for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 18/07/2002

ORAL JUDGEMENT

The present petition is arising against the order, dated 14.2.2002 passed by the Gujarat State Cooperative Tribunal in Appeal No.112/97 and Revision Application No.190/99 whereby the tribunal has set aside the exparte award passed by the Nominee in Lavad Suit No.1282/91 and has directed the Nominee to decide the suit after giving opportunity of hearing and after

leading evidence within a period of two months.

2. The short facts of the case are that the petitioner preferred Lavad Suit No.1282/91 before the Registrar, Board of Nominees for directing the society to hand over the possession of Flat No.C/23 and in the said suit the petitioner also prayed for an amount of Rs.3,38,000/- with interest at the rate of 12% p.a. as mesne profits by way of compensation. It is the case of the petitioner that the respondent-Society did not take proper steps for defending the suit proceedings and since the respondent-Society did not properly defend the suit, the Nominee proceeded exparte and ultimately on 28.2.97 the Board of Nominees allowed the suit of the petitioner by directing the society to hand over the possession of Flat No.C/23 and also further directed for payment of RS.2500/- p.m. from 1.6.85 till actual possession is handed over towards the mesne profits and further interest at the rate of 12% p.a. is also awarded.

3. The case of the petitioner is that against the judgment and award dated 28.2.97 Appeal No.190/99 is preferred by the society and simultaneously application being Application No.53/97 for restoration of suit was also moved. The learned Nominee after hearing both sides was pleased to pass order on 20.5.99 whereby the restoration application is dismissed. Against the said order of the Nominee dated 20.5.99 the respondent-society preferred Revision Application No.190/99. The tribunal heard the Appeal No.112/97 with Revision Application No.190/99 and found from the material available on record that the concerned advocate did not intimate the society and as a result thereof the suit has proceeded exprte and therefore the tribunal found that the case was made out for restoration and therefore ultimately the tribunal allowed the restoration application and as a consequence thereof the appeal against the exparte judgment and award is also allowed. It is that order of the tribunal dated 14.2.02 which is under challenge in this petition.

4. Mr.R.R.Shah appearing for the petitioner submitted that the tribunal has not properly considered the material on record, more particularly, that the society has remained lethargic in defending the suit proceedings and only after exparte judgment and award was passed, appeal was preferred and restoration application was also preferred. Mr.Shah also submitted that the petitioner is a lady suffering from cancer and is awaiting for the outcome of the litigation before the Nominee and it took about seven years time for decision and therefore he submitted that when the party has

remained lethargic about the suit proceedings the tribunal ought not to have taken a lenient view. Mr.Shah also submitted that the Nominee found that the society was aware about the date of hearing and since the advocate was intimated regarding evidence the tribunal has taken contrary finding and therefore Mr.Shah submitted that the order of the tribunal deserves to be quashed and the exparte judgment and award passed by the Nominee requires to be maintained.

5. On behalf of respondent-Society Mr.Joshi supported the judgment of the tribunal by contending that the finding recorded by the tribunal was within the discretionary power exercised by the tribunal for allowing the restoration application for restoring the suit since the matter had proceeded exparte.

6. Considering the overall facts and circumstances of the case and, more particularly, when the finding is recorded by the tribunal that the advocate for the society did not produce the evidence at the relevant point of time and the society was not intimated by the advocate, there is a case for restoration. The same is finding arrived at by the tribunal on the material available on record and, therefore, this court while exercising power under Article 226/227 of the Constitution can not reappreciate the evidence on record and when the lower authority has upon the examination of record has found that no intimation was given, I am of the view that such finding arrived at by the tribunal for restoration of the matter can not be upset in exercise of constitutional powers in the absence of anyother cogent material on record.

7. However, the tribunal has overlooked the important aspect of the case that assuming for the sake of argument that the advocate of the society did not intimate to the society and as a result thereof the Nominee had proceeded exparte, then also the petitioner who was the plaintiff can not be made to suffer the costs of litigation. So far as the petitioner is concerned on account of communication gap between the respondent society and its advocate had to face the proceedings before the tribunal. In any case, the tribunal while allowing the application for restoration could not have overlooked the basic principle that nobody can be allowed to take undue benefit of his own wrong and in any event if the restoration is allowed without even imposing costs, it may encourage the litigant not to be careful enough about the proceedings and to come after the

proceedings are concluded. Therefore, I am of the view that the tribunal ought to have exercised the power of awarding costs to the petitioner who was respondent before the tribunal while allowing the application for restoration, and since the said aspect is not considered by the tribunal the order of the tribunal to that extent becomes vulnerable and deserves modification since the said aspect can clearly be said to be an error apparent on the face of record.

8. Both sides have declared before this court that they would cooperate with the suit proceedings of Lavad Suit No.1282/91 before the Nominee and the same may be directed to be decided within a stipulated time. As the same is of 1991, I also find proper to direct the learned Nominee to decide the suit.

9. In the result, the judgment and order, dated 14.2.02 of the tribunal is modified to the extent that the appeal No.12/97 shall stand allowed on condition that the respondent society pays amount of Rs.10,000/- to the petitioner herein within a period of four weeks from today and the Nominee shall decide the Lavad Suit No.1282/91 within a period of three months from today.

10. Petition is partly allowed to the aforesaid extent. Rule is made absolute accordingly.

18.7.02 (JAYANT PATEL,J)